Google Inc. et al v. Egger et al

Doc. 441 Att. 14

Exhibit 15

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guise that he is an agent of a refugee terrorist leader and then to target these recruited persons against the FBI, the Dade County Police, and the CIA, the ultimate goal being to infiltrate these agencies. F is to keep the intelligence officer informed as to his progress in this regard but his reports are to be made by mail, because the U.S. Government cannot open the mail unless a crime is being committed.

Comment.—As in case No. 4, no tap would be permitted under S. 1566. This is not the kind of information contemplated under the act. A tap would not be permitted under section 794 of title 18 as well. If F is to report in "by mail" is F going to do his recruitment by telephone? Does the Government plan to read S. 1566 to permit the refugee organizations to be wiretapped to find out if they are infiltrated? These are dangerous readings of S. 1566. The proper action is to allow the FBI, having this much information, to foil F's scheme.

In sum, the Justice Department is "reaching" for the exceptional case to establish the need for a deviation from the criminal standard. Contrary to all experience with judicial warrants in the wiretapping area, the Department presumes "strict construction" by judges will hamper legitimate intelligence. The Justice Department should be reminded that only seven judges, picked by the Chief Justice of the U.S. Supreme Court, will review these warrant requests. Of course, this does not give the Justice Department any certainty that all applications will be approved. But the criminal standard does not appreciably make the process more risky for the Government. On the other hand, the noncriminal standard is a dangerous precedent for abuse.

SENATE REPORT NO. 95-701

[page 1]

The Select Committee on Intelligence, to which was referred the bill (S. 1566) to amend title 18, United States Code, to authorize applications for a court order approving the use of electronic surveillance to obtain foreign intelligence information, having considered the same, reports favorably thereon with amendments and recommends that the bill, as amended, do pass.

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Purpose of Amendments

The Committee on the Judiciary adopted several amendments to S. 1566 designed to clarify and make more explicit the statutory intent, to provide further safeguards for individuals subjected to electronic surveillance pursuant to this new chapter, and to provide a detailed procedure for challenging such surveillance, and any evidence derived therefrom, during the course of a formal proceeding.

In order to make clear the judge's authority to review compliance with the minimization procedures, a provision has been added at the end of subsection (c). It provides that at the end of the period of time for which an electronic surveillance is approved by an order or an extension issued under this section, the judge may assess compliance with the minimization procedures required by this chapter. This provision is not intended to require the judge to assess such compliance, nor is it intended to limit such assessments to any particular intervals. The committee believes, however, that it is useful to spell out the judge's authority explicitly so that there will be no doubt that a judge may review the manner in which information about U.S. persons is being handled. This specifically includes information about U.S. persons acquired from electronic surveillance of a foreign power, as defined in section 2521(b)(1)(A), (B), or (C).

Subsection (d) authorizes the Attorney General to approve an emergency electronic surveillance prior to judicial authorization under certain limited circumstances. First, the Attorney General must determine that an emergency situation exists which requires the employment of electronic surveillance before an order authorizing such surveillance can with due diligence be obtained. In addition, the factual basis for the issuance of an order under this chapter must be present.

The procedures under which such an emergency surveillance is authorized are considerably stricter than those of the comparable provision in chapter 119, 18 U.S.C. 2518(7). First, only the Attorney General—as defined—may authorize such emergency surveillance, whereas in 18 U.S.C. 2518(7) the Attorney General may designate any investigative or law enforcement officer to authorize emergency interceptions under that subsection. Second, the Attorney General or his designee must contemporaneously notify one of the designated judges that an emergency surveillance has been authorized. There is no comparable requirement in 18 U.S.C. 2518(7). Third, an application for an order approving the surveillance must be made to that judge within 24 hours; 18 U.S.C. 2518(7) requires the application to be made within 48 hours. Fourth, the emergency surveillance cannot continue beyond 24 hours without the issuance of an order; under 18 U.S.C. 2518(7) the emergency surveillance may continue indefinitely until the judge denies the application. Fifth, the Attorney General must order that minimization procedures required by this chapter for the issuance of a judicial order be followed during the period of the emergency surveillance. There is no comparable provision under 18 U.S.C. 2518(7). This last provision is designed to insure that as much as possible be done to eliminate the acquisition, retention, and dissemination of information which does not relate to foreign intelligence purposes. The committee's intent is to place the Attorney General in the role of the court during the 24-hour emergency period. He must examine the minimization procedures as the court could normally do under paragraph (a)(4) of this section, and ensure that the appropriate procedures are followed.

The committee wishes to emphasize that the application must be made for judicial approval even if the surveillance is terminated within the 24-hour period and regardless of whether the information sequent trial testimony, a Government witness provides evidence that the electronic surveillance may have been authorized or conducted in violation of the court order. The most common circumstance in which such a motion might be appropriate would be a situation in which a defendant queries the Government under 18 U.S.C. 3504 and discovers that he has been intercepted by electronic surveillance even before the Government has decided whether evidence derived from that surveillance will be used in the presentation of its case. In this instance, under the appropriate factual circumstances, the defendant might move to suppress such evidence under this subsection even without having seen any of the underlying documentation.

A motion under this subsection shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the movant was not aware of the grounds for the motion. The only change in subsection (d) from S. 3197 is to remove as a separate, independent basis for suppression the fact that the order was insufficient on its face. This is not a substantive change, however, since communications acquired pursuant to an order insufficient on its face would be unlawfully acquired and therefore subject to suppression under paragraph (1).

Subsection (e) states in detail the procedure the court shall follow when it receives a notification under subsection (c) or a suppression motion is filed under subsection (d). This procedure applies, for example, whenever an individual makes a motion pursuant to subsection (d) or 18 U.S.C. 3504, or any other statute or rule of the United States to discover, obtain or suppress evidence or information obtained or derived from electronic surveillance conducted pursuant to this chapter (for example, Rule 12 of the Federal Rules of Criminal Procedure). Although a number of different procedures might be used to attack the legality of the surveillance, it is this procedure "notwithstanding any other law" that must be used to resolve the question. The committee wishes to make very clear that the procedures set out in subsection (e) apply whatever the underlying rule or statute refered to in the motion. This is necessary to prevent the carefully drawn procedures in subsection (e) from being bypassed by the inventive litigant using a new statute, rule or judicial construction.

The special procedures in subsection (e) cannot be invoked until they are triggered by a Government affidavit that disclosure or an adversary hearing would harm the national security of the United States. If no such assertion is made, the committee envisions that mandatory disclosure of the application and order, and discretionary disclosure of other surveillance materials, would be available to the defendant, as is required under title III. When the procedure is so triggered, however, the Government must make available to the court a copy of the court order and accompanying application upon which the surveillance was based.

The court must then conduct an ex parte, in camera inspection of these materials as well as any other documents relation to the surveillance which the Government may be ordered to provide, to determine whether the surveillance was authorized and conducted in a manner which did not violate any constitutional or statutory right of the person against whom the evidence is sought to be introduced. The subsection further provides that in making such a determination, the court may order disclosed to the person against whom the evidence is to be introduced the court order or accompanying application, or portions thereof, or other materials relating to the surveillance, only if it finds that such disclosure is necessary to make an accurate determination of the legality of the surveillance.

The question of how to determine the legality of an electronic surveillance conducted for foreign intelligence purposes has never been decided by the Supreme Court. As Justice Stewart noted in his concurring opinion in *Giordano* v. *United States:*

> Moreover, we did not in *Alderman, Butenko* or *Ivanov*, and we do not today, specify the procedure that the district courts are to follow in making this preliminary determination [of legally.]

394 U.S. 310, 314 (1968); see also, *Taglianetti* v. *United States*, 394 U.S. 316 (1968)[4]. The committee views the procedures set forth in this subsection as striking a reasonable balance between an entirely in camera proceeding which might adversely affect the defendant's ability to defend himself, and mandatory disclosure, which might occasionally result in the wholesale revelation of sensitive foreign intelligence information.

The decision whether it is necessary to order disclosure to a person is for the Court to make after reviewing the underlying documentation and determining its volume, scope, and complexity. The committee has noted the reasoned discussion of these matters in the opinion of the Court in *United States* v. *Butenko, supra.* There, the Court, faced with the difficult problem of determining what standard to follow in balancing national security interests with the right to a fair trial, stated:

> The distinguished district court judge reviewed in camera the records of the wiretaps at issue here before holding the surveillance to be legal * * *. Since the question confronting the district court as to the second set of interceptions was the legality of the taps, not the existence of tainted evidence, it was within his discretion to grant or to deny Ivanov's request for disclosure and a hearing. The exercise of this discretion is to be guided by an evaluation of the complexity of the factors to be considered by the court and by the likelihood that adversary presentation would substantially promote a more accurate decision. (494 F. 2d at 607.)

Thus, in some cases, the Court will likely be able to determine the legality of the surveillance without any disclosure to the defendant. In other cases, however, the question may be more complex because of, for example, indications of possible misrepresentation of fact, vague identification of the persons to be surveilled, or surveillance records which include a significant amount of nonforeign intelligence information, calling into question compliance with the minimization standards contained in the order. In such cases, the committee contemplates that the court will likely decide to order disclosure to the defendant, in whole or in part, since such disclosure "is necessary to make an accurate determination of the legality of the surveillance."[33]

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4. 89 S.Ct. 1099, 22 L.Ed.2d 302.

33 Cf. *Alderman* v. *United States*, 394 U.S. 165, 182 n. 14, 89 S.Ct. 961, 22 L.Ed.2d 176 (1968); *Taglianetti* v. *United States*, supra at 317.